



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 23, 1996

Mr. Johnny W. Ward
President, Board of Directors
Bexar-Medina-Atascosa Counties Water
Control and Improvement District No. 1
P.O. Box 170
Natalia, Texas 78059

OR96-1528

Dear Mr. Ward:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 100315.

The Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1 (the "district") received an open records request for certain personnel information. You state that the district is willing to produce all public information that is required to be produced under chapter 552 of the Government Code, but express concerns regarding the scope of the request. You also express concern that release of the requested information may involve the privacy rights of certain individuals or that the information may be confidential by law. The district specifically asserts that sections 552.101, 552.102, 552.103, 552.105, 552.107, 552.111, and 552.117 of the Government Code may apply.

We first address your questions concerning the scope of the request. You note that information that may be responsive to the request may go back approximately 25 years. Section 552.222(b) provides that a governmental body may ask a requester to clarify a request for information if the request is unclear. Section 552.222(b) also provides that if a large amount of information has been requested, the governmental body may discuss with the requester how the scope of a request might be narrowed. *See also* Open Records Decision No. 563 (1990), 561 (1990). A governmental body is required, however, to make a good faith effort to advise the requester of the types of documents available that may be responsive to the request. *Id*; *see also* Open Records Decision No. 87 (1975). In the case at hand, the district may wish to contact the requestor to determine whether the requestor actually wants information dating back 25 years.

We also address the general obligations of the district in responding to an open records request. The district has prepared written responses that contain the requested information. A governmental body is not required to create or obtain new information in response to an open records request. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *see also* Open Records Decision No. 605 (1992). Additionally, a governmental body is not required under the Open Records Act to answer general questions or perform legal research for a requestor. Open Records Decision Nos. 563 (1990) at 8, 379 (1983) at 4. A governmental body is required, however, to make a good faith attempt to match a request for information with information held by the governmental body. Open Records Decision No. 561 (1990) at 8. Thus, in the situation at hand, the district is only required to provide the requestor with responsive documents already in existence that are not excepted from disclosure. A governmental body and a requester may agree that in response to a request for information, the governmental body will provide answers or retyped information, rather than the actual underlying documents. Open Records Decision No. 606 (1992) at 2-3. If the requester does not agree, however, the Open Records Act requires a governmental body to make available copies of the *actual record requested*, with any confidential or otherwise nondisclosable information excised. *Id.*

We now address the specific exceptions to disclosure raised by the district. You express concern that the information may involve the privacy rights of certain individuals. Section 552.101 protects information when disclosure of the information would constitute the common-law tort of invasion of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 628 (1994) at 4, 579 (1990) at 2, 562 (1990) at 9. Information may be withheld under section 552.101 in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *See* Open Records Decision No. 628 (1994). Section 552.102, which protects certain personnel information, has the same scope as section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The request at hand seeks information regarding the salary and performance of certain public employees. This office has held that information relating to a public employee's salary and job performance is public information. Open Records Decision No. 342 (1982) at 3 (name, position, experience, tenure, salary and education long held to be disclosable). This information is not highly intimate or embarrassing and there exists a legitimate public interest in this information. *See* Open Records Decision No. 165 (1977). Thus, this information must be disclosed. The request also seeks information regarding whether these employees are land owners. This office has held that information regarding the personal financial affairs of public employees is protected under common-law privacy and section 552.101. Open Records Decision No. 600 (1992). To the extent that information regarding the land owned by these employees is maintained solely for personnel purposes, this information would be protected

as personal financial information under section 552.101. If, however, this information is not specifically maintained for personnel purposes but instead relates to the district's public business, this information would be available to the requestor.

The district also asserts section 552.117, relating to the home address, phone number, social security number, and information regarding family members of certain district employees. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. The information submitted by the district to this office does not appear to contain any of the information protected by section 552.117. To the extent this information is responsive to the request, and if the district employees that are the subject of this information requested that it be kept confidential under section 552.024 prior to the district receiving the request for information, the district may not release this information. See Open Records Decision Nos. 622 (1994), 455 (1987). Otherwise, the information is public information that must be released.

The district also asserts that the requested information is excepted from disclosure under section 552.103 of the Government Code, contending that litigation is both pending and reasonably anticipated. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 638 (1996), 551 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Open Records Decision No. 638 (1996).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.*; see also Open Records Decision Nos. 555 (1990), 346 (1982). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

The district states that it believes criminal charges have been filed relating to an alleged incident involving the district employees who are the subject of this request. The district also anticipates that civil litigation may be forthcoming because of this incident. The

district notes that the open records request is made by an attorney who has apparently been retained by a district employee. We conclude, however, that the district has not provided this office with sufficient information to conclude that litigation involving the district is either pending or reasonably anticipated. Therefore, the district may not withhold the requested information under section 552.103.

Finally, the district raises sections 552.105, 552.107, and 552.111. However, because the district did not explain how these exceptions apply to the requested information, we do not consider them. See Gov't Code § 552.301(b)(1); Open Records Decision No. 363 (1983). The district may not withhold the requested information under these exceptions.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS' followed by a stylized flourish.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 100315

Enclosures: Submitted documents

cc: Mr. Albert L. Rodriguez
101 Stumberg
San Antonio, Texas 78204
(w/o enclosures)